BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C. 20554

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IN THE MATTER OF) A Company of Commencer of the Commence
TELEPHONE COMPANY-CABLE TELEVISION CROSS-OWNERSHIP RULES, SECTIONS 63.54-63.58) CC DOCKET NO. 87-266
AND	DOCKET FILE COPY ORIGINAL
AMENDMENTS OF PARTS 32, 36, 61, 64,	<u> </u>
AND 69 OF THE COMMISSION'S RULES	
TO ESTABLISH AND IMPLEMENT) RM-8221
REGULATORY PROCEDURES FOR VIDEO	
DIALTONE SERVICE	

SOUTHWESTERN BELL CORPORATION'S MOTION FOR LEAVE TO FILE REPLY COMMENTS OUT OF TIME

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ATTORNEYS FOR SOUTHWESTERN BELL CORPORATION

April 12, 1995

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, D.C. 20554

In the Matter of)
TELEPHONE COMPANY-CABLE)
TELEVISION Cross-Ownership Rules,) CC Docket No. 87-266
Sections 63.54-63.58)
and))
Amendments of Parts 32, 36, 61, 64, and 69 of	,)
the Commission's Rules to Establish and) RM-8221
Implement Regulatory Procedures for Video)
Dialtone Service)

SOUTHWESTERN BELL CORPORATION'S MOTION FOR LEAVE TO FILE REPLY COMMENTS OUT OF TIME

Comes now Southwestern Bell Corporation ("SBC") and requests the Federal Communications Commission ("FCC") to grant it leave to file one day out of time its *Reply Comments* in connection with the FCC's *Fourth Further Notice of Proposed Rulemaking* herein, a copy of which is attached hereto. In support whereof, SBC avers:

- 1. The reply comments in connection with the FCC's Fourth Further Notice of Proposed Rulemaking were due to be filed on April 11, 1995. Over 70 parties filed initial comments, most of which were more than 40 pages in length. A summary of the initial comments prepared for internal use at SBC totalled more than 20 pages.
- 2. Undersigned counsel, who is stationed in SBC's corporate headquarters in San Antonio, had prepared the final draft of SBC's *Reply Comments* for filing in the late afternoon of April 11. An illness had prevented counsel from finalizing the pleading before that day. SBC's Washington office had alerted the FCC's clerk that the filing would arrive shortly before closing. However, due to the operation of a

facsimile machine the pleading did not arrive in the Washington office in sufficient time to deliver to the clerk of the FCC before its office closed.

3. Grant of this one-day extension will not harm any party to this proceeding. Because the pleading at issue is a reply to initial comments, no additional responsive round is scheduled. Therefore, no party will be deprived of any time to prepare a reply to SBC's pleading. In anticipation of the FCC's grant of this motion, SBC has served all parties to the proceeding with a copy of its *Reply Comments*.

WHEREFORE, SBC prays the FCC to grant it leave to file SBC's Reply Comments herein one day out of time.

Respectfully submitted,

Southwestern Bell Corporation

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ATTORNEYS FOR SOUTHWESTERN BELL CORPORATION

April 12, 1995

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SUMMARY

After reviewing all 70+ initial comments filed herein, SBC remains convinced that the FCC has erred, perilously and in violation of both constitutional and statutory directives, by suggesting that it may mix principles of Title II and Title VI regulation of LEC provision of video programming. Rather, as argued in the *Initial Comments of SBC*, the LEC retains the option of choosing either a Title II (video dialtone) or a Title VI (cable service) operation. The choice is that of the LEC, not the FCC, because it flows from the nature of the undertaking of the LEC, not any public policy the FCC wishes to pursue. From this verity two other conclusions flow. The services of a video dialtone programmer, even if it is a LEC or affiliated with one, must not be regulated as a cable operator. The video operations of a LEC (or its affiliate) which chooses the cable model cannot be regulated under Title II as a common carrier.

It follows from this simple syllogism that many of the Commission's suggestions in the 4th FNPRM are not available and many others make little sense. A LEC or its affiliate MAY (not "should be permitted to," which implies some choice on the part of the regulator) provide programming over the LEC's VDT platform. The FCC may not and should condition the provision of video programming by LECs upon their offer of VDT. The FCC should not reject the VDT model completely but, rather, improve it so that both a common carrier and a private carriage version become viable alternatives.

No further "consumer safeguards" beyond those already in place for the provision of nonregulated and enhanced services by LECs are necessary in the context of

video programming. For example, the cost and price rules contained in Parts 32, 36, 61 and 69 accommodate both video dialtone provision and cable service without any distortion of those rules. No further permutations or clarifications are necessary. A structurally separate subsidiary requirement would be contrary to the Commission's own prior conclusions and serve to deprive consumers of the efficiencies of an integrated network. To the extent that such a requirement is not imposed on cable operators as they enter telephony, it may also be unconstitutional. Similarly, the Commission's current CPNI and joint marketing rules not only are adequate to protect against anticompetitive behavior; it would be illogical to apply more stringent restrictions on the use of CPNI and joint marketing on services which a LEC enters with no market share and will compete with such large, well-established providers. The provisions of the Communications Act related to discrimination should be adequate to prevent any discrimination in the provision of video dialtone service. Section 214 applications are unnecessary for the provision of video transport service and it would be unlawful to require them for the provision of cable service or video programming provided over a VDT network.

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REPLY COMMENTS OF SOUTHWESTERN BELL CORPORATION

Comes now Southwestern Bell Corporation ("SBC") and files its *Reply Comments* herein in response to the Federal Communications Commission's ("FCC" or "Commission") *Fourth Further Notice of Proposed Rulemaking ("4th FNPRM")*, released January 20, 1995 (as modified by Order released March 1, 1995, extending time for reply to April 11, 1995).

I. <u>INTRODUCTION</u>

Nearly all comments filed agreed on one salient point: A telephone company ("LEC" or "telco") can no longer be restrained from offering video programming if it chooses to do so. Nonetheless, the comments vary from insisting that LECs can ONLY provide cable service and that the invalidation of 47 U.S.C. § 533(b)

on constitutional grounds eliminates video dialtone ("VDT") service completely, to an insistence that LECs cannot provide cable service and common carrier telecommunications service over the same facility. In fact, nothing in the initial comments alters any of SBC's fundamental points in its own *Initial Comments*, as follows:

- A LEC may choose to provide VDT, cable service (or neither). If the LEC chooses VDT service, it or its affiliate may also provide video programming over that platform.
- If a LEC chooses VDT service, the common carrier VDT services (i.e. the video transport offered indifferently to all purchasers) are not subject to Title VI regulation.
- If a LEC chooses cable service, no portion of that service is subject to Title II regulation.
- The FCC's consumer safeguards, such as its cost allocation rules, customer proprietary network information rules, network disclosure rules, etc. are adequate to manage all public interest concerns regarding the provision of programming by a LEC over the same facility it uses to provide telephony.

SBC will demonstrate these conclusions in light of the other comments.

II. A LEC MAY CHOOSE TO PROVIDE VDT, CABLE SERVICE OR NEITHER. IF THE LEC CHOOSES VDT, IT OR ITS AFFILIATE MAY ALSO PROVIDE VIDEO PROGRAMMING OVER THAT PLATFORM.

A. The FCC May Not and Should Not Condition the Provision of Video Programming by LECs upon Their Offer of VDT.

No initial commenter opposed the Commission's proposal to allow LECs to provide video programming over VDT platforms.¹ No doubt this remarkable unanimity

¹Though some, of course, question the validity or viability of VDT in the wake of the constitutional rejection of telco/cable cross-ownership restrictions. See, e.g., Comments of NCTA at 7. SBC has been vocal in the past with its own doubts over the viability of VDT as presently constituted. SBC agrees with USTA and BellSouth, among others, that the Commission should retain VDT and cable as separate but distinct models, and let the market decide. It is possible that one mode may be preferable over the other in

finds its source in the fact that every court asked to examine the constitutionality of the previous prohibition against LECs providing programming has found that it violates the LECs' right of free speech under the First Amendment. The FCC's proposal merely reaffirms that the LEC right to program necessarily carries the right to program over one's own facilities, including those already constructed and despite the fact that these facilities already carry other common carrier services.

Not surprisingly, then, none of the initial comments offered a legally sufficient justification for the FCC to adopt its ill-advised and anticompetitive proposal of the *FNPRM* to require the building and maintenance of a VDT network, in order for the LEC to be permitted to operate a programming business. Of course, as SBC and numerous other companies noted initially, to do so would deprive the LEC of precisely the right which every court examining the issue has upheld: the right of a telephone company to speak through the act of selecting and delivering video programming to end user subscribers.

Further, no commenter disputed the position take by SBC and the other RBOCs that the FCC cannot condition the LECs' free speech right upon the prior conditions precedent to common carrier regulation, most especially making application under 47 U.S.C. § 214, because this would require the LEC to offer a common carrier service which it has not chosen to offer. If the FCC cannot compel a LEC to offer video transport service on a common carrier basis, it cannot require the offer of that service as

certain types of markets. Only experience can add that information.

a condition precedent to the offer of cable service.² While Viacom appears to argue that the *NARUC* decisions³ do permit the FCC to impose common carrier status where necessary, this clearly is false and a distortion of the holdings. Rather, as the Court of Appeals for the District of Columbia recently reiterated, common carrier status emerges from the nature of the company's undertaking.

Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance.... [The FCC] may not impose common carrier status or any given entity on the basis of the desired policy goal the Commission seeks to advance.⁴

Once a common carrier service is undertaken, many (perhaps unintended) consequences may follow. But if a company has not chosen to offer a public service and has not in fact taken steps to do so, *NARUC I* stands for the proposition that it cannot be forced to offer the service.

Media General would have the Commission believe that LEC provision of video programming over its own VDT network is not constitutionally protected. It reaches this clearly erroneous conclusion based on two mistaken premises. From this

²This condition precedent process may well constitute a prior restraint on constitutionally protected speech as well. See generally Gannett Co. Inc. v. DePasquale, 443 U.S. 368 (1979); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). However, the FCC need not reach this issue if it agrees that the injunctions against it compel the agency to permit the LECs to choose either VDT or cable service.

³NARUC v. FCC, 525 F.2d 630 (D.C. Cir. 1976) ("NARUC I"); NARUC v. FCC, 533 F.2d 601 (D.C. Cir. 1976) ("NARUC II").

⁴SWBT v. FCC, 19 F.3d 1475, 1481 ("Dark Fiber Case") (D.C. Cir. 1994). In the very case cited by Viacom, the Court expressed the same thought. NARUC v. FCC, 525 F.2d 630, 641 (D.C. Cir. 1976 ("NARUC I")): [T]o be a common carrier one must hold oneself out indiscriminately to the clientele one is suited to serve...." (emphasis supplied).

conclusion, Media General then argues that LECs can be prohibited from using their own facilities to engage in constitutionally protected speech, suggesting that the FCC should require physically separate networks for telephony and cable when provided by the same company. Media General posits this conclusion because the court decisions dealt only with cable service and because common carrier services enjoy less free speech protection than other forms of media. *Media General* at p. 3.

Media General unreasonably narrows the holdings and squarely misinterprets the clear intention of the courts as reflected in the various injunctions entered. While the decision certainly means that LECs cannot be restrained from offering cable service, because the intention of 47 U.S.C. § 533(b) was to forbid just that, the effect is much broader. Indeed, the FCC now is enjoined from banning telephone company provision of video programming⁵ "in any manner or fashion...." See, e.g., Memorandum Opinion and Order, Southwestern Bell Corp et al. v. United States, Northern District of North Texas,

3:94-CV-0193-D (March 27, 1995).

Media General also is wrong in conjecturing that common carriers are more limited in their access to the protections of the Constitution than other providers. It was just this sort of mistake that led to the passage of the cross-ownership restriction. A common carrier's speech is not any less protected for the identity of the provider.⁶

⁵See, e.g., Initial Comments of Southwestern Bell Corp. at p. 6.

⁶While the identity of the speaker does not affect his right to speak, other factors impacting the medium of speech may. Thus a narrow line of case have upheld strict regulation of broadcast media on the ground that the resource is so scarce and the

One must distinguish between the carrier's speech, rather, and the speech of others it may carry to discern whose rights are being infringed. See, e.g., Sable Communications v. FCC, 492 U.S.C. §§ 115, 133 (1990) (Scalia, J., concurring).

Most importantly, however, Media General totally subverts the original purpose for VDT and the best reason for permitting telephony and cable to use the same network: to create facilities-based competition for incumbent cable companies. While Media General argues that permitting LECs to become video information providers on their own VDT networks will not encourage the development of telecommunications infrastructure, the fact is that NO broadband deployment of any consequence commenced until LECs saw that they would be permitted to participate in video service delivery by use of that network. Even so, until LECs began to win reversals of the telco/cable cross-ownership restriction, little progress occurred. Removing the right to use that network for both cable and telephony is likely to dampen any LEC enthusiasm for investment in broadband infrastructure. Until a significant

interest in diversity so important that the regulation is justified even in the light of First Amendment scrutiny. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The FCC itself has recognized that this rationale does not apply to wired communications, even with the limited number of delivery systems currently available to programmers. See 4th FNPRM at ¶ 8, n.26; ¶ 46. This is because the scarcity in Red Lion was created by physical limitations, not economic ones. The Supreme Court recently appeared to agree. Turner Broadcasting System v. FCC, ___U.S.____, 114 S. Ct. 2445, 2460-61 (1994).

⁷Media General's real complaint, and the reason it suggests that the FCC will not create "real" "intramodal" competition against cable companies with LECs provision of video and telephony over the same network, is that the regulation of the two models is "different" and therefore "unfair." While it is different it is because of differences in the obligations to customers and even the identity of those customers, as explained in SBC's *Initial Comments* herein. SBC will deal with the perceived inequity in Section III below.

number of customers own digital receiver capability, the revenues from provision of capacity alone are likely to be inadequate to support deployment of a broadband network. Contrary to Media General's protectionist approach, acknowledgement of the LEC's right to combine telephony and video is essential to creating competition for the incumbent wired cable providers.

Some commenters, of course, preferred one regime over the other and erroneously argued that the Commission is free to choose which method best accomplishes its policy goals. *Comments of MCI* at 4-5. SBC believes that the diversity of choice actually strengthens the Commission's policy development by making real world experimentation possible, the best form of fact-finding. However, the most important reason that these commenters are wrong is that the option belongs to the LEC, not the FCC, regardless of the nobility of the public policy goal. A number of commenters (in a different context, of course), reminded the Commission that it was helpless to modify a statute's limits to further a policy goal, quoting three recent judicial decisions which excoriate the Commission's apparent attempts to do so. SBC concurs.

B. The FCC Should Not Prefer the VDT Model Over the Cable Model for LEC Provision of Video.

A minority of commenters support restriction of LEC video programming to the VDT model. See, e,g., Viacom Comments at 4. Despite the arguments of Viacom

⁸Usually while arguing vociferously either that Title II regulation must apply or equally vociferously that Title VI regulation must apply. Compare, e.g., Comments of Viacom at 4-10 with Comments of Cox at 20-21.

⁹SBC v. FCC, Case No. 93-1562 et al., slip op, Jan. 20, 1995 at 8-9; MCI v. FCC, 756 F.2d 1186, 1194 (D.C. Cir. 1985); AT&T v. FCC, 487 F.2d 865, 880 (2nd Cir. 1973).

and Entertainment Made Convenient ("EMC³"), however, the courts have not embraced VDT as a permissible regulation of free speech to achieve "important" governmental interests. The Commission itself does not make this mistake. *See 4th FNPRM*, ¶ 46, n.95. The portions of these judicial decisions referenced in Viacom's comments merely note that VDT is one alternative which is more narrowly tailored than an outright ban, to demonstrate that the ban *ipso facto* was not the most narrowly tailored method to achieve the goal. Whether mandatory VDT would trigger intermediate scrutiny, much less survive it, was not before any of these courts *Id*.

The most significant flaw of Viacom's analysis, however, is that it assumes that a mandatory Title II framework is somehow "narrowly tailored" to serve important goals, such as programming diversity, 10 without excessively burdening protected First Amendment activities. *Viacom Comments* at 9. Since the same public interest goals should apply to cable service itself, it is hard to imagine that Viacom is arguing that the rules applicable to cable service, *e.g.*, program access, do not adequately serve this governmental interest. Interestingly, the Motion Picture Association of America ("MPAA") agrees. *Comments* at 2-5.11

¹⁰Cox, on the other hand, finds the more important governmental interest to be that of harmonizing regulation of competing providers. *Comments* at 15-16. The PEG Access Coalition directly contradicts Viacom's argument, suggesting that the cable option better protects the first amendment rights of programmer customers and the property rights of municipalities. *Comments* at 11. Whatever else is true about the governmental interest at stake and the best way to protect it, clearly these matters are not free from doubt.

¹¹See also Comments of Media General, at 11, arguing that restricting LECs to VDT will NOT encourage infrastructure and will not increase diversity of information or robust competition; Comments of Cox at 7-10.

C. The FCC Should Not Choose the Cable Model to the Exclusion of the <u>VDT Model</u>.

SBC has never been glowing in its support of VDT. Nonetheless, it is worth retaining if only to ensure that the Commission leaves no stone unturned in its desire to encourage broadband infrastructure development and facilities-based competition for cable service providers. If the FCC improves the current VDT rules, however, they may be worth retaining.

Many commenters disagree. Cox, for example, argues that the Commission cannot retain VDT because the underpinnings are gone and it must build a new record for the construct. SBC too urged the FCC to reconsider the foundation of VDT in this proceeding, but to guide its hand in resolving the sticky questions of statutory construction it raised. Certainly many of the elaborate "protection" against LEC incursion into the then-verboten territory of video programming are so much overkill now that LECs have won back the right to participate in that market. That does not mean (though other facts might) that there is no market for common carrier video capacity offerings. Many LECs appear to wish to try the model, as evidenced by the *Initial Comments* of OPASTCO and USTA. Denying them this right would seem inconsistent with the FCC's charge to make universally available advanced telecommunications nationwide, with its avowed desire to generate wired competition for cable operators and the tendency generally to satisfy customer demands with new services.

Several, including Cox, posit that inconsistent regulation requires a choice

among the models. This notion is equally uncompelling under these facts. Cox assumes without proof that it will not be permitted to offer VDT while continuing to operate as a cable system. On the contrary, SBC argued initially herein that these same Solomonic choices must be imposed in exactly the same way on cable companies. If SBC must offer a common carrier video service as the price of providing the private version, so must Cox. If the video transport portion of video service is severable so as to render lawful (in the face of 47 U.S.C. § 541(c), which forbids common carrier regulation of a cable service) a requirement to offer it as a condition precedent to offering cable service, the same rationale applies to the cable companies. SBC believes Cox should not be left out of the opportunity to experience whatever mixture of regulation the Commission ultimately applies to SBC's services.

Others, like NCTA, appear to argue that the FCC should require the cable model because inadequacies in common carrier regulation in the face of this "brand new" enhanced service. SBC contends that the Commission took great pains in developing over the course of the last ten years all the "safeguards" necessary to mix regulated, nonregulated, affiliated and enhanced services in one network, one corporate structure and numerous consumer protections.

Still others, notably the broadcast and public interest community and some portions of the local governments, maintain that the cable model should be the exclusive one because local franchising is an essential tool in protecting important public policy goals. This argument, too, ignores some key facts. Telephone companies, in virtually every state in the Union, are "franchised" by some state or local entity. This entity may

not be (indeed often is not) the same entity that franchises cable operators. But a state public utility commission, for example, hardly can be said to be oblivious to the concerns of localities regarding customer service, safety and the like. Additionally, telephone companies must apply to local authorities for permission to use the public rights of way and easements. The negotiations for these "rights to use" are quite complex. Finally, telephone companies pay sizable gross receipts and other types of local taxes or assessments for the privilege of using the public streets which are expressly designed (and conditionally authorized so as) to compensate the local entity for disruptions occasioned by that use. These fees often exceed the 5% statutory maximum which can be assessed upon cable operators for LECs.

SBC neither wishes to ignore the legitimate concerns of local governments nor to pay twice for a single incursion upon the public domain. Individual state legislative efforts which reexamine and harmonize the basis for these assessments and provide explicit guidelines for local requirements would be preferable to the extreme positions of Cox and NCTA. See Comments of Cox at 11-13 (arguing erroneously that because the advanced services expected as a result of VDT have not arrived, it is a failure).

¹²SBC does not mean to imply that VDT is a viable option today. At least four changes must be made before VDT could approach becoming realistic: (A) Anchor tenancy must be permitted, at least for analog capacity, and LECs must be permitted to serve as an anchor tenant; (B) No limit should be placed on the amount of capacity any programmer (including a LEC) can utilize; (C) The FCC should streamline (or eliminate) the requirement for a § 214 application for VDT service; and (D) The Commission should impose no restrictions on joint marketing by the LEC of video and telephony nor any limits on its use of CPNI to do so.

III. IF A LEC CHOOSES TO OFFER VDT SERVICE, THE COMMON CARRIER VDT SERVICES (I.E., THE VIDEO TRANSPORT OFFERED INDIFFERENTLY TO ALL PURCHASERS) ARE NOT SUBJECT TO TITLE VI REGULATION.

Anticipating the flood of commenters that assume the First Amendment decisions moot the resolution of the local franchise issue in *NCTA v. FCC*, 33 F.3d 66, 72 (D.C. Cir. 1994) ("*NCTA*"), SBC took some pains to explain why LECs (or their affiliates) that provide video programming over their own VDT networks are not "cable operators" and why the systems they use are not "cable systems," in the statutory sense. We will not repeat that analysis here. Suffice it to say that SBC did not anticipate only one argument on this point. The Association Of America's Public Television Stations and Media General contend that control of the system video content and delivery becomes "unified" once a LEC provides programming over its VDT platform and therefore, the LEC (or the LEC and its affiliate collectively) constitute a "cable operator." 13

BellSouth, however, did anticipate this notion. In its *Initial Comments*, BellSouth explained that unified control in the sense of a cable system simply is impossible in the VDT setting, because the LEC will never control ALL the capacity of the system, unlike a cable operator. *Comments* at pp. 29-30. This distinction not only makes sense of the statute's "bright line" between common carrier services and cable

¹³These commenters rely on the definition of "cable operator," which includes any group of people, including affiliates, which control the management of a cable system. 47 U.S.C. § 541(b). BellSouth's interpretation, however, short-circuits that argument by reasoning that NCTA would not treat the VDT network, even with programming, as a "cable system," because the facilities are "divided and diverse....." Cf. Brief for Respondents, NCTA, supra at 22.

services. It also harkens to the discussion in *NCTA* of the fundamental differences between VDT and the cable service for which LECs have won the right to provide. *See NCTA*, *supra* at 75. BellSouth reminds us that an unaffiliated programmer which uses telephone company-provided channel service and one that uses a VDT platform differ in just this respect; yet that is enough to make the former a "cable system" and the latter not. *Cf. NCTA*, *supra* at 66, 75.

For the reasons in SBC's and BellSouth's *Initial Comments* herein, SBC submits that the FCC should not and cannot treat the provision of video programming over a VDT network as a "cable system."

IV. IF A LEC CHOOSES CABLE SERVICE, NO PORTION OF THAT SERVICE IS SUBJECT TO TITLE II REGULATION.

NCTA, among others, argues that both Title II and Title VI should apply to any LEC video offering. As noted above, even if the FCC could distinguish intellectually (and legally) the transport piece of video from the programming so as to make lawful the application of common carrier regulation of the transport, this conclusion should apply with equal force to "traditional" cable operations, a result they surely would detest. It should be clear that Title II regulation of the transport offering is adequate to accomplish all appropriate public policies without hampering the video programmer. Further, NCTA and the others have not articulated how it is fair, reasonable or lawful to require two franchises of a telco video operation (Title II and Title VI) but only one from cable companies. Indeed, Cox suggests just the opposite is true, arguing that "two different types of regulation" of companies which provide the

same speech-related services violates the equal protection and First Amendment rights of the speakers. *Comments* at 15-16.

- V. THE FCC'S "SAFEGUARDS" ARE ADEQUATE TO MANAGE ALL PUBLIC INTEREST CONCERNS REGARDING THE PROVISION OF PROGRAMMING BY A LEC OVER THE SAME FACILITY IT USES TO PROVIDE TELEPHONY.
 - A. Current Cost Rules Are Adequate To Prevent Cross Subsidy And Other Anticompetitive Behavior.

The FCC's current cost rules can accommodate VDT. A LEC's ability to offer video programming on the VDT common carriage platform does not invalidate these rules. New technology, coupled with competition in all areas of information development and transfer, will eventually necessitate a comprehensive examination of the regulatory rules. However, customer benefits to be derived from VDT deployment should not be delayed until new telecommunications policy can be crafted. Contrary to MCI's assertion, until such time as a comprehensive telecommunications policy can be developed, SBC is convinced that existing Parts 32, 36, 61, 64, and 69 will suffice. VDT associated costs can be adequately identified subsidiary accounting records with the existing Part 32 rules. Current Part 64 rules provide the means to segregate the regulated and non-regulated portions of the VDT network regardless of the provision of video on a Title II or title VI platform. Existing Part 36 rules will adequately accommodate the categorization and jurisdictional allocation of the regulated VDT investment. Price regulation, set forth in Parts 61 and 69 of the rules, coupled with the competitive marketplace, will prevent cross-subsidization among regulated services. No further changes are needed.

B. MCI's Recommendation For Additional Cost And Price Safeguards Should Be Rejected.

MCI and NCTA argue that more specific protection should be imposed. They claim that the cost allocation and pricing rules are inadequate to handle this service addition. MCI contends that significant changes are required to Parts 32, 36, 61, and 69 rules to accommodate video dialtone and programming costs under the video dialtone common carriage arrangement. This contention is erroneous, however, because MCI mischaracterizes the rules. For example, MCI states, "The price cap rules do not prevent LECs from allocating 75 percent of loop investment used to jointly provision VDT and telephony to the intrastate jurisdiction..." (page 8). MCI obviously confuses Part 36 with Part 61. Nowhere in the price cap rules is reference made to the 25 percent interstate basic allocation ratio that is part of the separations rules.

The separation rules do assign 75 percent of the cost of the <u>subscriber</u> common line loop category to the intrastate jurisdiction (page 10). However, MCI fails to acknowledge that the channel used to provision VDT service fits the separations definition of a Wideband Channel, and will therefore be categorized to the Wideband Category rather than to Subscriber Common Loop. The VDT cost assigned to the Wideband category will be directly assigned to jurisdictions where appropriate and the remaining VDT costs will be split between the state and interstate jurisdictions based on an appropriate allocator.

MCI's assertion that Part 32 is not designed to be service-driven is indeed correct, but, contrary to their implication, video dialtone service does not and should not

modify that precept. As new technologies are deployed, the distinction between loop and trunk, switching and circuit, and even the distinction between services become less and less discernable. To assert that Part 32 should be redesigned to capture video service-specific costs in the face of such network evolution should be recognized as merely MCI's attempt to further delay the LEC's rollout of this service. SBC asserts the subsidiary accounting records within the existing Part 32 rules can capture the costs associated with VDT.¹⁴

C. Other Suggestions Are Equally Without Merit.

The remaining "safeguards" suggested by the commenters are almost as varied as the services these companies themselves offer the public. One of the most often voiced (and least-successfully supported) is a structurally separate subsidiary.

AT&T, for example, yearns for an operation which has a separate sales force, separate operations, accounts, personnel, property, planning, marketing and promotions, which will purchase all services from the LEC at tariffed rates and handle all transactions at "arms-length" (or further). *Comments* at 12-13. This topic is nearly ancient history. The FCC has a proud history of enhanced service provision through nonstructural safeguards, detailed (among numerous other places) in SBC's *Initial Comments* herein. Only if the Commission turns its back on the structure for all enhanced services should the question be specifically raised for video, and even then the AT&T plan should be rejected. Video service provision by LECs has even less need to be corralled than other enhanced

¹⁴MCI also totally ignores the critical point that a proper price cap regime renders the cost allocation issues moot. A company has no incentive to misallocate costs when its pricing is not directly tied to the costs allocated.

services because LECs enter this market with no market share and no inherent advantages.

Viacom and other cable operators insist that certain cable-specific rules should be applied to LEC video even if offered under a Title II model. For example, Viacom seeks a prohibition on discrimination in access to the proprietary specifications of settop boxes. It urges an expedited complaint process for VDT, apparently due to the (perceived) dramatically important nature of these issues and the "seriousness" of the harm to consumers if violations occur. Viacom states as fact the erroneous notion that the FCC defines "substantially all" analog capacity to be not more than 50 percent for allocation purposes (without citation) and urges application of the channel positioning rules, even if it is unclear just how to do so in a VDT environment. Compag seeks unbundling of CPE from programming. NCTA suggests, consistent with its desire to marry the most onerous parts of Titles II and VI, that Section 214 should apply to the LEC regardless of whether it seeks permission to build VDT facilities or common carrier video transport facilities. NCTA would further slow the VDT approval process by requiring continuous open enrollment, channel positioning by lottery and access to Level II gateways even though it admits that no one knows how helpful this will be in reaching customers. All these notions are transparent and unworthy of comment, or are being examined in other proceedings, where a more complete record will be established. SBC, therefore, will not add further paper to this proceeding but refers the Commission to those dockets.

D. No Further Restrictions on a LEC's Use of CPNI Nor on Its Joint Marketing of Video Services are Necessary or Appropriate.

NCTA and Viacom, respectively, suggest that LECs should not be permitted to sell video and telephony in the same customer contact and that the LEC's video operations should not be permitted access to the customer proprietary network information (CPNI) related to its telephone customers. Neither of these suggestions should be adopted. While the comments argue that the joint marketing of video and telephony provide an insurmountable competitive advantage to the LEC, they remain absolutely silent about the reverse. Cable companies today are not restrained from making such joint sales. Nor are they restrained from using the information they have collected about their cable customers' video usage to design and market telephony to those customers. This competitive inequity cannot and should not be tolerated by the FCC. But the solution is not to prevent either operation access to the other. Rather, the Commission should apply the current CPNI and joint marketing rules applicable to the enhanced services provided by telecommunications common carriers to both types of companies.

As SBC argued in its *Initial Comments*, any further restrictions on joint marketing and use of CPNI in the context of video services would be particularly incongruous. Not only has the Commission twice been successful in defending the efficacy of these rules (and the other portions of its enhanced services framework) on

appeal.¹⁵ Most importantly, there is even less need for such protections in the context of video programming delivery than in most other enhanced services. Unlike voice mail, for example, which was characterized at the beginning of LEC entry by very small providers with minute market shares, video programming is dominated by large providers with huge service territories, significant vertical integration and impressive financial partners. See *Initial Comments of SBC*, *Attachment A*, herein. These companies are in little need of the FCC's kind protection against the "threat" of LEC competition.

Neither Viacom nor NCTA, moreover, demonstrate in any way the essential connection between video and telephony which might justify special treatment of its joint marketing. While Viacom suggests that a call to the local telephone company is the first one a newcomer might make, the call to the cable company is not far behind, and in the homes of sports and arts fans or those where children reside, the cable call probably comes first, if for no other reason than because that service typically takes longer to install. More to the point, Viacom has no reason to contend that a customer would not be more likely to buy service from the company well-established in the field than from the newcomer phone company. If the realtors sold video, one could not assume that to be such a market advantage that the practice must be condemned.

Similar points can be made regarding the use of CPNI. Cable operators are not now forbidden from relying on customer video usage data to sell them telephony

¹⁵As the Commission is well aware, the remaining issue on remand is the extent to which LECs must unbundle their services to serve the basic tenets of the enhanced services framework. Joint marketing, CPNI and costing and pricing rules are not a part of the Court's remand, even though the Commission has chosen to solicit comment on these matters once more.